(43)

8-31-07

No. 06-43

In the Supreme Court of the United States

STONERIDGE INVESTMENT PARTNERS, LLC,

Petitioner,

v.

SCIENTIFIC-ATLANTA, INC. AND MOTOROLA, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Pursuant to this Court's Rule 25.5, respondents submit this supplemental brief to address issues regarding the record that have been raised by the Solicitor General's brief for the United States. See generally Stern, Gressman, Shapiro, & Geller, SUPREME COURT PRACTICE (8th ed. 2002), at 666-667; see also *id.* at 464.

In their brief, respondents advance several arguments in support of the judgment below, including those based on reliance; the language of Section 10(b) ("use or employ" a "deceptive device" "in connection with" a securities transaction); Congress's rejection of a private right of action for aiding and abetting when it enacted Section 20(e); and loss causation. Although agreeing with respondents that the decision below should be affirmed, the Solicitor General suggests that certain of these arguments were not fully presented below. That suggestion overlooks important elements of the record.

In particular, the Solicitor General states that "[r]espondents did not seek dismissal in the district court on the ground that the 'in connection with' requirement was satisfied, and neither of the courts below addressed that question." U.S. Br. 16 n.7. In fact, the argument *was* presented to both courts below.[1] There accordingly can be no doubt that

[1] See, *e.g.*, Scientific-Atlanta Mot. To Dismiss Br. 16 ("Plaintiff has utterly failed to properly plead," among other things, that respondents "caused Plaintiff economic harm in connection with the purchase and sale of a security"); Scientific-Atlanta Br. in Opp. to Mot. To Amend and Reconsider Dismissal 8 n.4 ("the requisite connection between S-A's alleged conduct and the purchase or sale of Charter securities is lacking"; plaintiff's claim "overlook[s] th[e] mandatory 'in connection with' requirement"); Scientific-Atlanta CA8 Br. 22-23 ("A commercial transaction unconnected to the purchase or sale of a security cannot fall within Section 10(b) simply because the party standing on the other side of the transaction was a public company whose stock was purchased and sold by

the Court may rely upon petitioner's failure to satisfy the "in connection with" requirement of Section 10(b) in affirming the Eighth Circuit's judgment: a respondent "is entitled under [this Court's] precedents to urge any ground which would lend support to the judgment below" (*Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977)), "whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). See Stern, Gressman, Shapiro, & Geller, at 444-445 (citing cases).

Similarly, the Solicitor General fails to present a full picture when he states in passing that respondents "did not separately raise the issue [of loss causation] in the court of appeals." U.S. Br. 25 n.15. Although it is true that respondents did not advance a loss causation argument under a separate heading in their appellate briefs, they did present loss causation as a ground for dismissal, both in their briefs to the Eighth Circuit and at oral argument. See Scientific-Atlanta CA8 Br. 22 (plaintiff "was not harmed by the existence" of the Vendors' agreements with Charter); oral arg. Tr. 13 ("broad, tort-based causality determinations are not the same as the statutory scheme under Section 10(b)")[2]; see also Scientific-Atlanta Mot. To Dismiss Br. 20 ("The Complaint also fails to allege specific facts showing that Scientific-Atlanta proximately caused the economic harm that Plaintiff alleges it suffered"). The Solicitor General does correctly recognize that the complaint in this case "fails sufficiently to allege loss

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investors from time to time."); see also Motorola Mot. to Dismiss Br. 2, 8 (incorporating Scientific-Atlanta arguments).

[2] There is no official transcript of the Eighth Circuit oral argument. The citation in text is to a transcript prepared by respondents from the Eighth Circuit's recording of the argument. The recording is accessible at http://www.ca8.uscourts.gov/oralargs/oaFrame.html., No. 05-1974.

causation" (U.S. Br. 26) and that the Court may affirm the Eighth Circuit's decision on that ground. *Id.* at 25 n.15.[3]

Finally, the Solicitor General's brief demonstrates why the Eighth Circuit's decision should be affirmed whether or not the contracts procured by Charter "misle[]d Charter's outside accountant.'" U.S. Br. 17, 17-30. See also 15 U.S.C. § 7242 (emphasis added) (Sarbanes Oxley law, in addition to refusing to restore private aiding and abetting claims, provides that efforts to "mislead any independent public or certified accountant" shall be dealt with solely by the SEC: "In any civil proceeding, the Commission shall have *exclusive* authority to enforce this section and any rule or regulation issued under this section"). But the Court should bear in mind that neither the first nor the second amended complaint alleges that the Vendors had *any* dealings or communications with Arthur Andersen. The complaints fail to allege facts showing that the Vendors initiated or encouraged Charter's multi-faceted fraud, or that any statement or act of the Vendors was relied upon, or even known to, any member of the investing public.[4]

[3] There is no doubt that the other grounds for affirmance argued by respondents were fully presented below. See, *e.g.*, Scientific-Atlanta CA8 Br. 9, 25-28 (reliance); Motorola CA8 Br. 15-16 (reliance); Scientific-Atlanta Mot. To Dismiss 19-20 (reliance); Scientific-Atlanta CA8 Br. 14 n.6 (Section 20(e)); Motorola CA8 Br. 19 (Section 20(e)). Moreover, as the Solicitor General notes (U.S. Br. 6, 7, 18 n.9), both the district court and the court of appeals accepted the Vendors' submission that plaintiff did not establish reliance.

[4] Respondents agree with the Solicitor General (Br. 11-17) that "nonverbal deceptive conduct" can violate Section 10(b), where all the prerequisites of primary liability are satisfied. Resp. Br. 21-22. But merely alleging a deceptive scheme does not suffice. SG Br. 17-30. In *Central Bank*, plaintiff argued unsuccessfully to this Court (1993 WL 13006274, at *1) that "Central Bank provided critical assistance to the fraudulent scheme by taking affirmative

For the foregoing reasons and those stated in respondents' brief, the decision of the court of appeals should be affirmed.

Respectfully submitted.

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steps to ensure that the shortage of collateral and the defects of the appraisal would be hidden from plaintiffs," that it participated in "a concealed side agreement" to implement "the fraudulent scheme" (*id.* at *7), that it had "extensive involvement in the issuance of the 1988 bonds" (*ibid.*), and that it acted "knowingly or recklessly" (*id.* at *1). See *Central Bank* complaint ¶¶ 52, 64 (plaintiff "trusted" that Central Bank would perform as indenture trustee without engaging in the fraudulent "conspiracy" and "scheme"). These characterizations did not transform Central Bank into a primary violator.